

HOGAN & HARTSON

Hogan & Hartson LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
+1.202.637.5600 **Tel**
+1.202.637.5910 **Fax**

www.hhlaw.com

Peter A. Rohrbach
+1.202.637.8631
parohrbach@hhlaw.com

August 16, 2007

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 07-156, Comp. Pol. File No. 812 – In the Matter of Application of Pac-West Telecomm, Inc. to Discontinue Domestic Telecommunications Services

Dear Ms. Dortch:

Dollar Phone Corp. (“Dollar Phone”), by its attorneys, hereby responds to the Reply of Pac-West Telecomm, Inc. (“Pac-West”), filed in support of its Section 63.71 Application to discontinue certain services in 24 states and the District of Columbia (the “Eastern Network”).¹

Dollar Phone has explained the serious public interest harms that would befall consumers if the Commission were to permit Pac-West to terminate service on the accelerated basis it proposes in its Application.² As should be clear by now, Dollar Phone is not asking the Commission to deny the Pac-West Application in full or to withhold its approval of discontinuance in certain markets for more than a short period of time. Approximately half the Eastern Network can be turned down on August 26th without injury to consumers, and Dollar Phone is working very hard so that the remaining markets can be shut down on a rolling basis in succeeding weeks.

¹ See Reply of Pac-West Telecomm, Inc. in Support of Application to Discontinue Certain Services, Docket No. 07-156, Comp. Pol. File No. 812, filed Aug. 13, 2007 (“Reply”).

² See generally Opposition of Dollar Phone Corp., WC Docket No. 07-156, Comp. Pol. File No. 812, filed Aug. 10, 2007 (“Opposition”).

Under the circumstances, the approach proposed by Dollar Phone is reasonable, and it is required by Section 214. It protects the interests of pre-paid card users whose service ultimately depends on Pac-West and its Eastern Network. Dollar Phone has every incentive to move to alternate carriers as quickly as possible; in the last several days, the company has been able to make significant progress to that end. Dollar Phone would be pleased to update the Commission and Pac-West on its transition status every five business days (or on any other schedule the Commission would find useful) to assist the Commission in evaluating when it would serve the public interest to allow Pac-West to discontinue service in each of the remaining Eastern Network markets that cannot – and should not – be permitted to shut down on August 26th.³

That said, Dollar Phone feels obligated to respond to some of the inaccurate or misleading statements contained in Pac-West's Reply. Pac-West has incorrectly minimized both the impact of its proposed discontinuance on consumers, and the amount of work involved for a company like Dollar Phone to transition fully off of the Eastern Network. Pac-West also has misread the Commission's authority to protect the public interest here. And while Pac-West complains that a brief additional delay in closing its network will cost it and its creditors some money, Pac-West ignores the fact that, as a practical matter, low income consumers will bear the financial as well as service-related harm of Pac-West's actions if the Commission permits a precipitous and complete network discontinuance on August 26th. To ensure that the record in this proceeding is complete, these issues are discussed more fully below.

1. *Pac-West glibly minimizes the serious impact its proposed discontinuance would have on consumers.*

Pac-West does not deny that if it discontinues service on August 26th, hundreds of thousands of consumers will lose the ability to rely on local access numbers for their pre-paid cards to meet their critical calling needs. Instead, Pac-West tries to minimize the effect of this loss by suggesting that "calling card services are not like basic local exchange services for which any disruption can mean an interruption in a user's ability to reach emergency 911 service."⁴

³ Pac-West has approached Dollar Phone with an offer to keep its network open in the affected markets for five additional days. While Pac-West appreciates the gesture, this proposal is too limited to solve the practical problems here. It also is worth noting that while Dollar Phone has submitted requests to port its local access numbers away from Pac-West's Eastern Network to its replacement carriers, those porting requests cannot be effectuated unless and until Dollar Phone's replacement carriers have sufficient facilities in place to accommodate those porting requests. While Dollar Phone is hopeful that this will occur over the next several weeks, Dollar Phone cannot at the moment predict with any greater precision when this may occur, as much of what needs to be done is outside of its immediate control.

⁴ Reply at 18.

Pac-West also suggests that consumers “have numerous alternatives,” including “other prepaid providers, wireless (including prepaid), payphone, and ‘plain old telephone’ service.”⁵

These responses speak volumes about Pac-West’s insensitivity to problems that are not its own. Regardless of what Pac-West may think of pre-paid cards, they are of critical importance to those who use them. As Dollar Phone explained in its Opposition, a large percentage of pre-paid card users are immigrants, non-native English speakers, and lower income consumers who do not subscribe to more costly home telephone services and rely on pre-paid products for their calling needs.⁶ For these consumers, pre-paid cards serve as a lifeline to family, friends, employers, and others with whom they must communicate. To the extent these consumers can afford telecommunications services at all, they typically are in the form of pre-paid services. Any suggestion that these consumers can purchase costly mobile phones or rely simply on home telephone service completely misses the mark.

Pac-West also posits that “[t]he worst case” is that “customers must use a toll-free access number temporarily until the local access numbers are transitioned from Pac-West.”⁷ But this ignores the fact that the Dollar Phone wholesale pre-paid product is designed primarily for local access connectivity in local markets – something Pac-West should know because the company has been the underlying provider of that connectivity. The large majority of pre-paid card traffic transits such lines.

This has two relevant consequences. First, most consumers are not familiar with toll-free access. Vendors of the wholesale pre-paid services provided by Dollar Phone typically do not promote as visibly the use of toll-free access numbers because such usage is more expensive to consumers than the use of local access numbers. Card vendors give local numbers prominence on their cards, and those are the numbers callers use. If Pac-West discontinues service in those markets prematurely, the practical results are predictable. The large majority of pre-paid card holders would try the local access number they are used to dialing, find that it failed, try the number again, and again hit failure. At that point few of these consumers would be likely to figure out the toll-free option; they instead would conclude that the card was defective and abandon efforts to use it.

Second, and in any event, Dollar Phone’s toll-free access lines today are configured to accommodate only a small percentage of Dollar Phone’s traffic, reflecting the focus on local number access. If all of Dollar Phone’s customers were suddenly to start using the company’s toll-free access numbers to place calls, the capacity of the company’s toll-free circuits would be exceeded and customers would hear only a busy signal when attempting to connect to the network. Although Dollar Phone could take actions to increase the capacity of its toll-free access

⁵ *Id.* at 19.

⁶ Opposition at 5.

⁷ Reply at 3.

lines to accommodate such an increase in traffic, those steps would, in effect, be identical to (and take materially the same amount of time) as the steps Dollar Phone already is taking to order and provision local access trunks from an alternate carrier to transition its service off of the Pac-West Eastern Network.⁸ And even if Dollar Phone somehow could increase its toll-free access line capacity within a matter of days – which it cannot – there is no way Dollar Phone could communicate this change (and the resulting higher calling costs) through its retail vendors to the hundreds of thousands of consumers who rely on its wholesale pre-paid service under multiple vendor brands.

Finally, in addition to misstating the loss of service consumers would suffer, Pac-West minimizes their likely financial losses as well. First, Pac-West suggests that consumers will just hold on to their cards and wait until Dollar Phone has been able to move to an alternative carrier, at which point the local access numbers will work again. This assumes that Dollar Phone will not lose the numbers when Pac-West shuts down, a serious risk that could prevent them from being ported to anyone. Furthermore, Pac-West is ignoring practical reality: if the cards do not work, consumers will not have any reason to think that the failure is only temporary; they will reasonably conclude that the cards are defective and abandon them.

Second, Pac-West distorts Dollar Phone's financial concern on behalf of the card holders. Contrary to Pac-West's innuendo, Dollar Phone certainly understands its obligations under law, not to mention its own business interest, in seeing that retail distributors of its wholesale services provide refunds where appropriate for cards that do not work. But Pac-West cannot ignore the real world here; few card holders are likely to go to the trouble of seeking refunds for the amount of usage left on cards when they experience service failure. They simply will walk away from a bad experience.

In short, Pac-West is asking hundreds of thousands of low-income card holders each to suffer several dollars of loss so that Pac-West can exit these markets a few weeks earlier than it otherwise should. These consumers will bear the cost of Pac-West's actions, both in the loss of communications service on which they depend, and in the form of financial loss that they can ill-afford but cannot practically recoup. Of course, Dollar Phone itself also would suffer significant harm insofar as it will deal with the fall-out of Pac-West's action, both in helping address such consumer complaints as they arise, and in the loss of business arising from distributor dissatisfaction, as those distributors will conclude that Dollar Phone's wholesale service is not reliable. This harm also is cognizable under Section 214. But the Commission's primary

⁸ The only material difference between provisioning new trunks to increase toll-free access capacity and provisioning alternative local access trunks is that the former would not require the additional step of porting DID numbers from Pac-West to the alternate carrier. Although bypassing the porting process could, at least in theory, reduce the time it would take Dollar Phone to set up an alternate network configuration, the difference in timing between the two processes is unlikely to be material. Pac-West itself notes that automated porting capability can substantially reduce the time needed to effectuate the porting process. *See id.* at 23.

concern should be to protect the interests of the consumers that Pac-West's precipitous action would injure.

2. *Dollar Phone has been working day and night to transition to an alternate carrier.*

As Dollar Phone explained in its Opposition, it was taken by surprise by Pac-West's sudden announcement that it would be discontinuing its Eastern Network, despite being one of the largest – if not the largest – Pac-West customers on that Network.⁹ Pac-West repeatedly reassured Dollar Phone that the Pac-West bankruptcy would not adversely affect service, and Pac-West continued to accept Dollar Phone orders well into July.¹⁰ While Pac-West representatives told Dollar Phone that the Eastern Network might be sold, they also simultaneously reassured Dollar Phone that such a sale would be transparent to customers who rely on the network. (Pac-West would have had an incentive to encourage customers like Dollar Phone to maintain and add service to increase the sale price of the Eastern Network, which may have been the reason for these apparent misrepresentations.)

Pac-West does not seriously dispute that Dollar Phone was sand-bagged. It produces a single e-mail sent to a Dollar Phone representative a mere three business days before Pac-West's official notice of discontinuance was sent to customers.¹¹ This e-mail still does not state that the Eastern Network will be shut down; it merely responds to a status request from a Dollar Phone representative who had been told of this possibility for the first time a few days before on the routine weekly call between the two companies.

Given the unexpected nature of this major development, Pac-West can hardly criticize Dollar Phone's diligence in working to transition its services to an alternate carrier. Dollar Phone provided in its Opposition a detailed explanation of the steps it must take to make this transition and will not repeat them here.¹² Suffice it to say that effectuating these steps in a responsible and reliable manner takes time. Pac-West surely must be aware of this given that it took the companies well over four months to accommodate Dollar Phone's transition two years ago to the Pac-West network. Although Dollar Phone has accelerated its processes wherever it

⁹ See Opposition at 7.

¹⁰ *Id.*

¹¹ See Reply at 10 and Declaration of Shawn O'Donnell, ¶ 6, Exhibit 9; see also Reply at 11. Pac-West also notes that in late June it announced the discontinuance of its international services. However, this action was irrelevant to Dollar Phone, which did not use such services. If anything, in the context of reassurances that Pac-West's bankruptcy would not impact service to Dollar Phone, this would have suggested that Pac-West was re-focusing even more on its domestic operations, including the Eastern Network.

¹² See Opposition at 10-14.

can, and has made significant progress in recent days, the company still lacks confirming information from the new carrier as to exactly when it can be sure to migrate off the Pac-West Eastern Network in key markets.

Pac-West cannot show otherwise. It points to a brief delay Dollar Phone experienced at the end of last week in transitioning off Pac-West's network in Florida.¹³ However, the real story there is that Dollar Phone was able to move most quickly in Florida because at least there it already had arrangements with an alternative carrier. While the cutover was delayed a few days, this was done with the knowledge that the delay was not material because the Pac-West network would still be operational for several more weeks. That cutover is expected to occur shortly.

Pac-West also tries to make much of the ability of other companies to leave its network by late August. Dollar Phone understands that many if not most of those other companies are VoIP providers who can shift off the Pac-West network much more easily for technical reasons. It also is likely that many of them operate only in a single market or in a small number of markets, or have other alternative carrier arrangements already in place. Dollar Phone can speak only for itself – a company highly dependent on Pac-West for local access arrangements that is moving as quickly as possible to deal with this unexpected and unfortunate situation. As noted above, Dollar Phone has every incentive to eliminate this cloud over its service as rapidly as possible, it is acting accordingly, and it is prepared to give the Commission regular updates on its progress.

3. *Temporarily delaying Pac-West's proposed discontinuance is not inconsistent with the Bankruptcy Court's order or with the Master Services Agreement ("MSA") between the parties.*

As explained by Dollar Phone in its Opposition, the Bankruptcy Court has done nothing to foreclose the Commission from delaying Pac-West's proposed discontinuance for a few additional weeks so consumers do not lose access to their critical pre-paid services.¹⁴ Indeed, if the Bankruptcy Court's order alone was insufficient to demonstrate this point, the transcript of the Bankruptcy Court proceeding that Pac-West included in its Reply states it clearly. The Court expressly recognized that the Commission would separately be considering this matter under Section 214, and referred public interest matters related to the impact on consumers to the Commission process.¹⁵ The Court expressly declined to rule on how its jurisdiction intersected with the Commission's discontinuance process. The short and tailored delay needed by Dollar Phone and pre-paid consumers will not conflict with that action.

¹³ Reply at 23.

¹⁴ Opposition at 19.

¹⁵ See Declaration of Shawn O'Donnell, Exhibit 5, p. 43, lines 12-14 (indicating that the Bankruptcy Court declined to rule on the jurisdictional question of whether its actions trumps the authority of the FCC and the Section 214 discontinuance process).

Pac-West also argues that the Commission is – or should be – powerless to act here because Section 18 of the MSA expressly authorizes Pac-West to exit a region on 30-days’ notice to Dollar Phone.¹⁶ This is wrong. First, and most important, the MSA must be read in the context of Section 214 and the Commission’s policies and rules related to discontinuance. Nothing in Section 18 states that Pac-West is free to cut-off service if that would harm the public interest, nor could it so trump the Communications Act and Commission processes. At most, Section 18 of the MSA would allow Pac-West to exit a particular region if the Commission finds that doing so satisfies Section 214. Indeed, a provision allowing Pac-West to terminate without Commission approval would be unlawful and unenforceable.¹⁷

Second, and in any event, as a contract matter Section 18 of the MSA must be read in the context of Section 20.7, which recognizes a transition period of up to 12 months as “commercially reasonable.” Pac-West contends that this provision is irrelevant because Section 20.7 governs contract termination and not discontinuance of a particular region.¹⁸ Of course, the decision to shut down service completely in half the country hardly can be said to amount to the mere exiting of a “market or region” under section 18 of the MSA. If anything, a decision with such substantial implications is more akin to a constructive termination of the MSA, thereby triggering the 12-month transition period.

The Commission does not need to address whether Pac-West’s actions constitute a contract breach. It only needs to decide the public interest here under Section 214. In doing so, it certainly is reasonable to take into consideration the fact that the MSA itself recognizes that, at least in Dollar Phone’s situation, it is not practical or reasonable to discontinue service in multiple markets on just 30 days notice (whatever the case might have been if only a single market were being cut off).

Again, Dollar Phone is not asking the Commission to enforce the MSA and force Pac-West to continue providing service for 12 months. To the contrary, Dollar Phone is doing all it can to expedite a transition to another provider. But the Commission should not be misled by Pac-West’s arguments that the Commission’s hands are tied and that it cannot protect the public interest under the Communications Act.

¹⁶ See Reply at 7.

¹⁷ In this regard, Pac-West’s reference to the absence of a “provision in the Communications Act expressly authorizing the Commission to regulate (*i.e.*, supervise in the public interest) privately negotiated contracts,” Reply at 8 (citing *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1279 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975)) is irrelevant, as the Commission would not be regulating under the contract; is simply would be carrying out its obligations under Section 214.

¹⁸ See *id.*, note 6.

4. *The potential harm to consumers far outweighs any impact on Pac-West from the brief partial delay in discontinuance required here.*

Finally, Pac-West approaches the use of scare tactics in discouraging the Commission from exercising its statutory responsibilities under Section 214. While not quite saying so, Pac-West tries to imply that even a short transitional delay in closing the Eastern Network jeopardizes its ability to provide service elsewhere or complete its reorganization. This is peculiar given that Pac-West has been operating the Eastern Network for the four months that it has been in bankruptcy, and indeed apparently had been trying to sell it as a going concern with value. Thus, the Commission can rightly be skeptical of such dire rhetoric.

Pac-West tries to suggest that the decision to shut down its Eastern Network is not entirely its own and that its creditors are demanding it.¹⁹ But a careful reading of the transcript from last week's Bankruptcy Court proceeding indicates that, although the creditors may support Pac-West's proposed discontinuance, the decision to shut down the Eastern Network ultimately was Pac-West's. Counsel for the Creditors took pains to make this clear:

I just want to make one final statement since words on the record sometimes take on more meaning than they're intended, during the course of his opening, Mr. Terrien [the attorney representing Pac-West] indicated that he had – there was some pressure from the secured lender to shutdown the east cost network. I want to be very clear in the record, Your Honor. This was the Debtors [sic] determination, it was vetted with, among others, the secured lender and the unofficial committee and we concur in the Debtors [sic] business judgment, [but] . . . this was not something that the secured lender was in any way pressuring the Debtor to do.²⁰

Dollar Phone does not have information to challenge Pac-West's claim that it will lose money in connection with the termination of the Eastern Network. However, we do challenge the notion that Pac-West's Western Network operations are jeopardized by the delay needed here. Indeed, Dollar Phone is a customer on the Western Network as well, and we have no interest in seeing disruptions there, but there is no basis to expect them. Pac-West has reported assets of \$57 million and 2006 revenues of over \$85 million. No doubt ownership of those assets will shift in the reorganization of the company, and some unsecured creditors will not be fully repaid. Gross revenues also are expected to be less in 2007, again not surprising in a bankruptcy situation.

¹⁹ Reply at 24 (citing Declaration of Shawn O'Donnell, Exhibit 5, p.22, line 16 to p.23, line 20).

²⁰ Declaration of Shawn O'Donnell, Exhibit 5, p.25, line 18 to p.26, line 2.

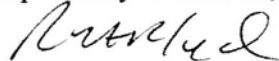
Letter to Ms. Dortch
August 16, 2007
Page 9

Dollar Phone does not minimize these matters, which is why we do not oppose Pac-West's plan to discontinue its Eastern Network as part of its plan of reorganization and predicate to its continued operations as a Commission-authorized carrier. Dollar Phone's only point is that, under Section 214, this discontinuance should be done on an orderly basis that does not place the burden on low income customers. The practical reality is that such customers collectively are likely to lose hundreds of thousands of dollars in prepaid service if their cards fail due to Pac-West's actions. In these particular circumstances, the Commission should protect the interests of those consumers, and require Pac-West to exit the affected markets on a somewhat slower timetable than Pac-West might otherwise prefer in its own private interest.

* * *

Please contact the undersigned if you have any questions concerning this letter.

Respectfully submitted,



Peter A. Rohrbach
Yaron Dori
Counsel for Dollar Phone Corp.

cc: Carmell Weathers (FCC)
John Adams (FCC)
Ethan Sprague (Pac-West)
Jean Kiddoo (Counsel for Pac-West)
Tamar Finn (Counsel for Pac-West)
Joshua Bobeck (Counsel for Pac-West)

Verification

I, Asher Gluck, Direct of Network Operations for Dollar Phone Corp., hereby certify under penalty of perjury that the information provided in the preceding letter contains true and accurate information to the best of my knowledge, information and belief, formed after reasonable inquiry.

Asher Gluck

August 15, 2007